IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 366

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

ELIZABETH B. BOWMAN, as Conservator of the Person and Estate of Charles Dale Bowman,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner, the Illinois Central Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court entered in this cause.

Opinions Below.

The opinions of the majority and dissenting Judges of the Illinois Supreme Court (R. 25-57) appear as Appendix B to this Petition, separately printed, and are reported at 11 Ill. 2d 186, 142 N.E. 2d 104.

The opinion of the Illinois Appellate Court (R. 2, Appendix to Petition for Leave to Appeal) appears as Appendix C to this Petition, and is reported at 9 Ill. App. 2d 182, 132 N.E. 2d 558.

The memorandum opinion of the trial judge in passing on petitioner's post-trial motions, (R. 3, Abstract of Circuit Court Record, pp. 457-460,) not published, appears as Appendix D to this Petition.

Jurisdictional Statement.

The judgment of the Illinois Supreme Court, here sought to be reviewed, was entered March 20, 1957. (R. 58-59; Appendix A.) A petition for rehearing was denied May 20, 1957, (R. 62,) and the judgment became final on that date.

The jurisdiction of this Court is invoked under Section 1257(3), Title 28, United States Code, providing for review by this Court by certiorari of decisions of State courts wherein a right or privilege is specially claimed under the Constitution or statutes of the United States, or where the validity of a statute of the United States is drawn in question.

Questions Presented.

In reviewing cases tried to a jury, Illinois Appellate courts have the common law and statutory power and duty to review the evidence introduced by both parties, and if the court finds that the verdict of the jury is contrary to the manifest weight of the evidence, to reverse the judgment and remand the case for a new trial. In Illinois, as in most other States, this power has become an integral part of the appellate remedial process. Illinois Appellate courts also have the common law and statutory power and duty to review the amount of a jury verdict in tort cases, and if the court finds that the amount awarded is grossly

excessive to reverse the judgment and remand the case for a new trial or to affirm the judgment upon condition of remittitur. The Illinois Supreme Court in the case at bar held that when Illinois Appellate courts are reviewing cases brought under the Federal Employers' Liability Act, the Act nullifies both these powers. This holding presents the following questions:

(1) When a State appellate court is reviewing a case instituted under the Federal Employers' Liability Act may it exercise its common law (and in some states statutory) power to review the evidence for both parties and to remand the cause for a new trial of the issues, if it finds that the verdict of the jury is contrary to the overwhelming or manifest weight of the evidence or is otherwise clearly unjust; or is this power nullified by the Act?

(2) When a State appellate court is reviewing a case instituted under the Federal Employers' Liability Act may it exercise its common law (and in some States statutory) power to review the amount of the jury verdict and to remand the cause for a new trial or affirm the judgment upon condition of remittitur, if it finds that the amount awarded is grossly excessive; or is this power nullified by the Act?

(3) If the Federal Employers' Liability Act purports to nullify aspects of the appellate jurisdiction of State reviewing courts, is the Act to that extent void because it encroaches upon the Constitutional right of the States, reserved by the Tenth Amendment, to prescribe and regulate the powers and jurisdiction of their courts?

Constitutional Provisions and Statutes Involved.

The constitutional provisions and statutes involved are lengthy, and are therefore set forth separately as Appendix E to this Petition.

Statement of the Case.

The accident and settlement. Respondent's ward, Charles Dale Bowman, was injured May 22, 1948, in Richland County, Illinois, while in the course of his employment for petitioner as a locomotive fireman. Bowman, with his attorney, settled his claim with petitioner on September 18, 1948, for $15,000, and a settlement release was given. R. 3, Abst. pp. 291-293.

The proceedings in the trial court. On November 6, 1950, respondent, on behalf of Bowman, brought an action against petitioner for damages under the Federal Employers' Liability Act in the Circuit Court of Cook County, Illinois. (R. 3, Abst. pp. 2-6.) An issue at the trial was Bowman's mental competency at the time he entered into the contract of settlement. (R. 3, Abst. pp. 9, 11.) On June 2, 1954, the jury returned a special verdict finding that he was incapable of understanding the effect of the release, and a general verdict fixing damages at $200,000. (R. 3, Abst. p. 21.) Petitioner's post-trial motions were denied. R. 3, Abst. p. 38; Appendix D.

The proceedings in the Illinois Appellate Court. Petitioner perfected an appeal to the Appellate Court of Illinois, First District, contending (1) that the special verdict was contrary to the manifest weight of the evidence and therefore the judgment should be reversed and the cause remanded for a new trial, (2) that numerous prejudicial errors had occurred at the trial in the receipt and rejection of evidence, in the conduct of respondent's counsel and in

instructions to the jury, each of which required reversal and a new trial, and (3) that the general verdict was grossly excessive, requiring a new trial or substantial remittitur.

On March 5, 1956, the Appellate Court filed its opinion (Appendix C) and rendered its judgment reversing the judgment of the trial court and remanding the cause for a new trial. The Court held the case must be retried because (1) the special verdict (that Bowman was incompetent when his claim was settled and released) was contrary to the manifest weight of the evidence, and (2) numerous prejudicial errors respecting the receipt and rejection of evidence had been committed at the trial.

The Court rejected respondent's argument, based largely on the memorandum decision in *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940, that the FELA nullified its power to require a new trial if the jury verdict was patently unjust, saying (App. 58A):

> "We cannot accept the reversal of the *Harsh* case, without explanation, as a decision against the right of an appellate state court to review the evidence in accordance with the uniform state practice . . ."

In view of its holding that the case must be tried again, and that all errors could be avoided on the new trial, the Appellate Court did not rule on petitioner's contention that the general verdict was grossly excessive or respondent's argument that the court was without authority to review the amount of damages awarded.

The proceedings in the Illinois Supreme Court. Respondent petitioned the Illinois Supreme Court for leave to appeal from the interlocutory and non-appealable judgment of the Appellate Court. (R. 1-2.) Pursuant to an order of the Illinois Supreme Court, the Appellate Court struck the portion of its judgment remanding the case for

a new trial (thus making its judgment final and appealable; see Section 75(2)(c) of the Illinois Civil Practice Act, Appendix E, p. 85A), and leave to appeal was granted to respondent by the Illinois Supreme Court. R. 14.

Respondent, in her petition for leave to appeal to the Illinois Supreme Court (R. 2, Pet. pp. 33-37) and in her brief after the granting of the petition (R. 18, Br. pp. 7-22) contended that a State appellate court is foreclosed by the FELA from reviewing the evidence and reversing and remanding for a new trial where it finds the verdict is contrary to the manifest weight of the evidence. Petitioner in its answer to the petition for leave to appeal (R. 16, Answ. pp. 7-12) and in its brief in support of the judgment of the Appellate Court (R. 20, Br. pp. 30-35) maintained that State appellate courts may exercise this jurisdiction in cases brought under the FELA, as in all other cases. This question of the interpretation of the FELA was squarely presented to and was decided by both courts, as appears from the opinions of the Appellate Court (App. 57A) and of the Supreme Court (App. 15A).

On March 20, 1957, the Illinois Supreme Court filed its opinion (R. 25-57; Appendix B) and by vote of four to three reversed the judgment of the Appellate Court and affirmed the judgment of the Circuit Court. R. 58-59, Appendix A.

The majority conceded that if the Appellate Court could exercise the jurisdiction vested in it by the Civil Practice Act and order a new trial when it found the verdict was contrary to the weight of the evidence, the Illinois Supreme Court could not review the correctness of the Appellate Court's determination of this question (R. 31; App. 10A):

> . . . judgments finalized under section 75(2)(c) [of the Illinois Civil Practice Act] can be reviewed by

this court only upon the same basis as other petitions for leave to appeal. Under section 92(3)(b) of the Civil Practice Act, the Supreme Court can examine cases brought to it by appeal from the Appellate Court as to questions of law only. Thus, even if a judgment of the Appellate Court is finalized under section 75(2)(c), this court could not review it if it merely raises the sufficiency of the evidence. *Olson* v. *Chicago Transit Authority*, 1 Ill. 2d 83.

"Judgments reversed and remanded for insufficient evidence ordinarily raise only factual questions relating to the weight of evidence. . . ."

The Court ruled, however, that in reviewing actions brought under the FELA the jurisdiction of the Appellate courts of Illinois to determine whether the jury verdict is contrary to the manifest weight of the evidence, was ousted by that Act. Relying primarily upon *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940, (R. 36; App. 17A) and *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, (R. 35; App. 15A-16A) the Court said (R. 48; App. 32A):

". . . the scope of review of a jury verdict in a Federal Employers' Liability Act case is governed by Federal law and is limited to determining whether there is an evidentiary basis for the jury verdict . . ."

In other words, the Court below held that the FELA nullifies all powers of State appellate courts to review facts except to determine whether plaintiff has made a *prima facie* case.

Addressing the merits of the case, the Supreme Court held that respondent had introduced enough evidence of Bowman's mental incompetency at the time he signed the settlement contract to withstand a motion for directed verdict. It then went on to hold that no prejudicial evidentiary errors were committed at the trial.

Petitioner by its petition for rehearing in the Illinois Supreme Court (R. 61, Pet. pp. 6-15) pointed out that the construction that the court placed upon the FELA is in conflict with decisions of this Court and of the highest courts of other states, and contended that the decision denied to petitioner here the equal protection of the law guaranteed by the Constitution of the United States and by the Illinois Constitution. The Court by its additional opinion upon denial of the petition for rehearing (App. 37A) reiterated its position and held (App. 43A) that "in the light of the decisions of the United States Supreme Court, which we are obliged to follow in construing such federal rights, the Illinois Appellate Court herein was limited to determining whether there was an evidentiary basis for the verdict."

In the Court's opinion no mention was made of petitioner's contention that the verdict was grossly excessive. In its petition for rehearing, petitioner stated that if the Supreme Court adhered to its original conclusions, it should remand the case to the Appellate Court to consider that question. (R. 61, Pet. pp. 18-19). The majority's supplemental opinion (R. 52-57; Appendix 37A-45A) did not refer to petitioner's contentions concerning the amount of the verdict or remandment to the Appellate Court.

The three dissenting judges (Justices Schaefer, Hershey and Davis) wrote (R. 49-52; Appendix 33A-37A) that the majority's "over-cautious" ruling, "that the Federal Employers' Liability Act has abrogated the traditional jurisdiction of our reviewing courts", resulted from misconceptions of "nebulous dicta contained in certain decisions of the United States Supreme Court," and that it is "neither the prerogative, nor the intent, of Congress to

regulate the jurisdiction of State courts". They concluded (R. 51; Appendix 35A-36A):

> "The present decision of our court reads into the memorandum of reversal in *Harsh v. Illinois Terminal Railroad Co.* 348 U.S. 940, 99 L.Ed. 736, a mandate to abolish a substantial part of our local jury procedure and to abandon the statutory duties created by our legislature. . . . Such a serious impingement upon the rights and powers of State courts should require a positive expression. When dealing with our traditional and historical legal procedures, we should be slow to find some unspoken compulsion of Federal law requiring their abolishment. Cf. *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 95 L.Ed. 3."

REASONS FOR GRANTING THE WRIT.

Foreword.

In Illinois, an appellant is entitled in the Appellate Court to a review of all issues. However, in actions at law, on appeal from the Appellate to the Supreme Court, review is by statute limited to questions of law; issues of fact are finally determined by the Appellate courts. (Ill. Stat. 1955, Ch. 110, §92(3)(b).) Whether a jury verdict is contrary to the manifest weight of the evidence is deemed to be a question of fact which is settled finally by the Appellate Court. Accordingly, before the Illinois Supreme Court addressed the merits of this case, it was faced with a jurisdictional question: Did the Appellate Court have the authority to order a new trial because the verdict was contrary to the manifest weight of the evidence? If that power existed, the Illinois Supreme Court was foreclosed from disturbing the Appellate Court's determination that a new trial was necessary. *Shaw* v. *Courtney*, 385 Ill. 559, 562-565; *Mabee* v. *Sutliff & Case Co.*, 404 Ill. 27, 31-33.

In resolving this first question the Supreme Court of Illinois decided an important federal question. It held that in FELA cases the Act nullifies the Appellate Court's jurisdiction to determine that the case should be retried on the ground that the jury verdict is contrary to the manifest weight of the evidence. Only because it reached this conclusion was the court below free to address the case on the merits. The Supreme Court of Illinois also held, by implication, that the Appellate Court was without jurisdiction to review the amount of the verdict and remand for a new trial or affirm on condition of remittitur, even though the amount of the verdict was excessive.

This Petition is directed to these holdings as to the jurisdiction of State appellate Courts in reviewing jury verdicts in FELA cases. Assignments of trial errors are not here involved, nor is the question of law whether the evidence was sufficient to take the case to the jury, nor the questions of fact whether the verdict was contrary to the manifest weight of the evidence or was excessive.

I.

In holding that the Federal Employers' Liability Act nullifies an integral part of the Illinois appellate remedial process, the Illinois Supreme Court has misconceived the intent of Congress and decisions of this Court. It thereby decided an important federal question, not heretofore determined by this Court, in a way which conflicts with basic principles established by this Court.

The Illinois Supreme Court held that in determining appeals in FELA cases, State appellate courts may not review the evidence introduced by both parties and remand for a new trial upon finding the verdict of the jury to be contrary to the manifest weight of the evidence. The court held that this power, which is a common law power of all State reviewing courts, and which has been codified in Illinois statutory law for over a century (Ill. Stat. 1845 Ch. 83, §22; Ill. Stat. 1955 Ch. 110, §92(3)(b)) is nullified when the court is reviewing cases brought under the FELA.

A. *The federal Congress, in enacting the FELA, or in amending it, did not intend to nullify or alter the jurisdiction or powers of State appellate courts.*

All relevant expressions of Congressional purpose indicate an intention to permit State courts to adjudicate FELA cases within their customary jurisdictional frame-

work. The only provision in the FELA concerning actions in State courts appears in the second sentence of Section 6, which was added in 1910 (45 U.S.C. §56):

> "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

The authors of this provision made it abundantly clear that this sentence was intended only to confirm that State courts could adjudicate FELA actions if they chose to do so, and that there was no thought to nullify or alter the jurisdiction of State courts which accepted these cases. H. R. Rep., No. 313, 61st Cong., 2d Sess., p. 7; 45 Cong. Rec., 2253-4, 3395, 4034; Senate Rep. No. 432, 61st Cong., 2d Sess., p. 5.

The dissenting Judges in the court below protested against the majority holding (R. 51; Appendix 36A):

> " . . . Such a serious impingement upon the rights and powers of State courts should require a positive expression. When dealing with our traditional and historical legal procedures, we should be slow to find some unspoken compulsion of Federal law requiring their abolishment. *Cf. Missouri ex rel. Southern Railway Co.* v. *Mayfield*, 340 U.S. 1, 95 L. ed. 3."

B. *The decision of the Illinois Supreme Court is based upon misconceptions of a number of decisions of this Court. It is in direct conflict with controlling principles announced by this Court.*

It is clear from the foregoing that no Congressional expression dictated the result reached by the court below. Decisions of this Court, properly understood, likewise do not support it. It has long been settled that the Federal Employers' Liability Act does not nullify or alter the jurisdictional limitations of State courts, or local policies as to their use. *St. L., I. M. & S. Ry. Co.* v. *Taylor*, 210

U.S. 281, 285; *Second Employers' Liability Cases*, 223 U.S. 1, 56-59; *Douglas v. N. Y., N. H. & H. R. Co.*, 279 U.S. 377, 387-388; *Herb v. Pitcairn*, 324 U.S. 117, 120, 123; *Missouri v. Mayfield*, 340 U.S. 1, 4-5.

The holding of the Supreme Court of Illinois is in direct conflict with this settled principle, reiterated in *Herb v. Pitcairn*, 324 U.S. 117, 120:

> " . . . there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

There can be no doubt that this power of Illinois Appellate courts, to reverse jury verdicts and remand for a new trial of the issues where the evidence on both sides convinces the court that the verdict is manifestly unjust, is an integral part of the appellate remedial process in Illinois. This power has been utilized from the earliest days. It has become a basic portion of the jurisdiction of Illinois Appellate courts. The important role of this supervisory power in the Illinois judicial process was explained in *Voigt v. Anglo-American Provision Co.*; 202 Ill. 462, 465-466:

> " . . . It is, of course, the bounden duty of the Appellate Courts to consider questions of fact properly presented and to correct errors of fact committed by the trial courts. To an assignment of error that the verdict and judgment are against the weight of the evidence it is obviously no answer to say that there was evidence tending to support the finding below . . . Where, however, it is alleged that the trial court erred in overruling the motion for a new trial, based

> on the ground that the verdict was against the weight of the evidence, the Appellate Court is the only tribunal that can correct the error, if any has been committed, and the aggrieved party has the undoubted right to have the decision of that court on the question. Its decision being final on such a question, the duty fully to consider and determine it would seem to be all the more imperative."

In 1940, the Illinois Supreme Court reviewed at length the genesis and development of this power, and found its roots in common law practice, codified into Illinois statutory law. The court said that although the power must be exercised under "strict limitations", since "the courts will seldom interfere with the finding of a jury in actions *ex delicto*", it served as a salutary bar against patently unjust or capricious action by juries. *Corcoran* v. *City of Chicago*, 373 Ill. 567, 575-580; appeal dism. 311 U.S. 610.

In light of the history and fundamental nature of this aspect of the jurisdiction of the Appellate courts in Illinois, the holding of the Illinois Supreme Court cannot be squared with the principles expressed in *Herb* v. *Pitcairn* and many other decisions of this Court.

The majority of the Illinois Supreme Court misapplied the principle underlying the cases on which they relied, for example, *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, and *Brown* v. *Western Ry. of Alabama*, 338 U.S. 294. Those cases, like *Arnold* v. *P.&S.F.Ry. Co.*, 353 U.S. 360, recently decided, teach that State courts may not, by application of local rules, *forever* conclude an injured employee's right of action under the FELA or right to a jury trial of fact issues. But these decisions are inapplicable to the case at bar, because exercise of the power to require new trials when the verdict is unjust *does not foreclose* the employee's right to recover or to a jury trial; the rights of both

parties to a jury trial of fact issues is fully protected and either may adduce new evidence on the retrial. And there is no right, constitutional or statutory, to keep a verdict which was obtained by improper means or which is clearly unjust. *Sinopoli* v. *Chicago Rys. Co.*, 316 Ill. 609, 619-620. See also *Galloway* v. *U. S.*, 319 U.S. 372, 390-394.

Since the court below has decided this case in a way that is contrary to the principles underlying applicable decisions of this Court, and has misapplied other decisions of this Court which it erroneously deemed controlling, this Court should exercise its discretion to review and reverse this departure from the law.

C. *The Supreme Court of Illinois has decided an important question not previously decided by this Court, erroneously believing that the issue was resolved in Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940.

The court below put its ultimate reliance on the *per curiam* decision of this Court in *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940, concluding that the issue presented in the case at bar was decided in the *Harsh* case. R. 36-37, App. 17A; R. 54-56, App. 40A-42A.

This Court's disposition of the *Harsh* case has produced much confusion. There, an Illinois Appellate Court had remanded a Safety Appliance Act case for a new trial on the ground that the verdict was against the manifest weight of the evidence (351 Ill. App. 272), the remanding order was stricken on plaintiff's motion making the reversal final, the Illinois Supreme Court denied leave to appeal leaving intact a final judgment for the defendant, and writ of certiorari was granted by this Court. The briefs filed in this Court raised as alternate issues whether the Appellate Court could review the evidence in a FELA case, and whether the Appellate Court's ultimate decision

that the defendant have judgment was correct. Oral arguments were heard. The decision of this Court reads simply: "Judgment reversed. *Lavender* v. *Kurn*, 327 U.S. 645."

It thus appears that an issue presented here was presented in the *Harsh* case. The perplexing question is whether this Court ruled on the issue. Six of the ten judges who have wrestled with the meaning of the *Harsh* reversal in considering the case at bar, believe this Court merely disagreed with the Appellate Court's conclusion on the weight of the evidence (R. 2, pp. xiv-xv; Appendix 57A-58A; R. 51; Appendix 35A-36A), while four believe this Court held the Appellate Court's power to reverse and remand for new trial was done away with by the FELA. R. 54-56; Appendix 40A-42A.

The citation of *Lavender* v. *Kurn*, we submit, reflects that this Court reviewed the record in the *Harsh* case and disagreed with the lower court's ultimate determination that the verdict was not supported by the evidence and that the defendant should have judgment, after the fashion of the many FELA cases, such as *Lavender* (see Note, 69 Harv. L. R. 1441), in which this Court has reviewed the *correctness* of lower courts' rulings that a verdict should be directed against the plaintiff or judgment entered against him notwithstanding the verdict. Never has this Court questioned the *authority* of State reviewing courts to make a determination of the sufficiency of the plaintiff's case. On the contrary, *Moore* v. *C. & O. R. Co.*, 340 U.S. 573, and *Brady, Admx.* v. *So. R. Co.*, 320 U.S. 476, upheld lower court rulings that the plaintiff's case was not submissible.

Moreover, it is most unlikely that the radical and far-reaching innovation, which the majority of the Illinois Supreme Court read into *Harsh* v. *Ill. Term. R. Co.*, would be embodied by this Court in a reversal without opinion.

Not long ago this Court found it necessary to intervene to prevent another State supreme court from surrendering local power under the misconception that the FELA, as construed by this Court, required it. *Missouri v. Mayfield*, 340 U.S. 1. See also *C. & O. Ry. Co. v. DeAtley*, 241 U.S. 310. This Court is now called upon to correct a similar baseless abdication of State authority.

We believe that the question raised in this case has never been decided by this Court, but in any event the issue is so important to the administration of justice in State courts (hereinafter, Part II) that it ought to be unequivocally resolved by this Court by full opinion.

II.

The courts of review of almost every State in the Union have asserted and upheld their jurisdiction to review the trial judge's determination of whether a new trial should be granted because the verdict is contrary to the manifest weight of the evidence. The holding of the Illinois Supreme Court that this power is nullified in FELA cases is in direct conflict with decisions of other State courts which have considered the issue. This important question should be expressly settled by this Court.

A conflict among courts of review of the several states as to their jurisdiction in reviewing FELA cases presents an independent ground for issuance of the writ of certiorari.

Almost every (if not every) State in the Union abides by the common law rule that the trial judge should grant a motion for new trial if the jury verdict is patently unjust or contrary to the overwhelming and manifest weight of the evidence. (66 C.J.S. *New Trial* §69 *et seq.*; 39 Am. Jur. *New Trial* §129 *et seq.*; *Wigmore on Evidence* (3rd

Ed., 1940) §2494; 48 Mich. L. R. 555.) And too, it has long since been held by almost every (if not every) State court of review that they have power to review the trial judge's determination of such a motion. (3 Am. Jur. *Appeal & Error* §890, p. 451; 5 C.J.S. *Appeal & Error* §1649, p. 536.) This supervisory power of the judiciary over the finality of jury verdicts in cases where the prevailing party has made out a *prima facie* case, has from early times gained universal acceptance as a salutary means of preventing the injustice of patently unreasonable jury verdicts. (See 24 Columbia L. R. 111 *et seq.*) In the words of this Court, the motion for new trial on the ground that the verdict is against the overwhelming weight of the evidence is a "classic mode of challenge". *Galloway v. U. S.*, 319 U.S. 372, 390-394.

In view of the widespread assertion of this power by the States in their systems of trial and appellate jurisprudence, it is only a matter of time before the question which divided the court below so violently is presented to the reviewing courts of every State in the Union. Yet there is no authoritative precedent from this Court; only ambiguous *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940.

Several State appellate courts have already addressed the question of their powers in reviewing FELA cases, and in each instance the courts reached conclusions in direct conflict with the holding of the Illinois Supreme Court in the case at bar.

Recently the Supreme Court of Oklahoma held that in FELA cases:

> ". . . we have authority to examine the record, weigh the evidence and to determine whether the verdict and judgment should stand or whether it should be set aside and the cause retried . . . " *St. L.-San. F. Ry. Co.* v. *King*, 278 P. 2d 845, 848.

In 1956 the New Mexico Supreme Court had decided, in accordance with the majority of the court below, that its reviewing powers were impaired by the FELA. On rehearing the court undertook an extensive review of the law, and then retracted its prior conclusion:

> " . . . Upon a further consideration of the question, we believe that in cases arising in State Courts under the Federal Employers' Liability Act, 45 U.S.C.A. §51 *et seq.*, all procedural matters, including review of verdicts for excessiveness, are governed by the law of the forum and not by the Federal Decisional Law. This view finds support in nearly, if not all jurisdictions. The cases are so numerous, we will not list them . . . . " *Rivera* v. *A., T. & S. F. Ry. Co.*, 61 N.M. 314, 299 P. 2d 1090, 1093.

The District Court of Appeals of California has twice reached a conclusion in conflict with that of the court below:

> " . . . the enforcement of the legal rights given and declared by said federal act [the FELA] is committed concurrently to the state courts, and the act does not attempt to attach any conditions to the practice and procedure through which the jurisdiction of the state courts shall be exercised in the enforcement of such rights. *Taylor* v. *Southern R. Co.*, 350 Ill. 139, 182 N.E. 805. It follows, therefore, that the hearing and determination of the cause, not only in the trial court, but also on appeal, must be had in accordance with the rules, principles and precedents governing the practice in the state court . . . " *King* v. *Schumacher* (1939) 32 Cal. App. 2d 172, 89 P. 2d 466, 472, cert. denied 308 U.S. 593; followed in *Woodward* v. *So. Pac. Co.*, 35 Cal. App. 2d 130, 94 P. 2d 1028, 1032, cert. denied 309 U.S. 670.

Prior decisions of the Illinois courts conformed to these views, until in the case at bar the four-judge majority of the court below silently overruled these precedents and

set Illinois at odds with all the other States. See, *e.g.*, *Mitchell* v. *L. & N. Ry. Co.*, 375 Ill. 545, 551; *Taylor* v. *Southern Ry. Co.*, 350 Ill. 139, 146; *Parthun* v. *E. J. & E. Ry. Co.*, 325 Ill. App. 408, 411.

Future conflicts can be anticipated, especially since statutes and rules of court in many States impose a positive duty on reviewing courts to reverse unjust jury verdicts and require a new trial of the issues. For example, in upholding a rule of court which grants this power, the Supreme Court of New Jersey said recently:

> " . . . The appellate tribunal cannot invade the constitutional office of the jury; it may not merely weigh the evidence where it is fairly susceptible of divergent inferences and substitute its own judgment for that of the jury. But, if the verdict be so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality, it cannot serve to support the judgment . . . As respects the appellate corrective process, there is no essential difference between a verdict that comes from misdirection and a verdict that constitutes a palpable perversion of the jury function . . .
>
> . . . . .
>
> " . . . The award of a new trial on appeal where the verdict clearly gives rise to the inference of mistake, passion, prejudice, or partiality does not constitute an undue interference with the constitutional right of trial by jury or the constitutional integrity of the inferior tribunal, for the jury has transcended its constitutional sphere to the substantial injury of the party adversely affected; and on the plainest principles of justice this fundamental error is remediable by the appellate process . . .
>
> "Whether a verdict is against the weight of the evidence, as thus defined, is in essence a judicial question that is generally deemed an integral part of the constitutional remedial appellate process. . . ." *Hager* v. *Weber*, 7 N.J. 201, 81 A. 2d 155, 159-160.

See also *Smith* v. *Times Pub. Co.*, 178 Pa. 481, 36 A. 296; *Gunn* v. *Union R. Co.*, 23 R.I. 289, 49 A. 999; *Hintz* v. *Mich. Cent R. Co.*, 132 Mich. 305, 93 N.W. 634; *DeCamp* v. *Central Arizona L. & P. Co.*, 47 Ariz. 517, 57 P. 2d 311.

One author who recently surveyed the entire area of "Substance and Procedure in State FELA Actions" (Hill, 17 Ohio St. L.J. 384, 403) concluded that "there has been, not unnaturally, much confusion" in reviewing courts as respects the proper function of judge and jury in determining FELA actions. However, the decision of the court below is, to our knowledge, the first in which the highest court in any State has held the FELA emasculates the jurisdiction of local appellate courts. Other State courts have held to the contrary. Undoubtedly the rest will sooner or later address the problem.

This case presents a far-reaching and important issue, arising out of the interpretation of a federal statute, which should be expressly settled by this Court. The orderly administration of justice in FELA cases in State courts will be settled only by a full opinion on the subject by this Court.

III.

In holding that the Federal Employers' Liability Act nullifies the power of State reviewing courts to determine whether the amount awarded by the jury is excessive, the Illinois Supreme Court has decided an important federal question in a way that conflicts with prior decisions of this Court and other State courts. This important question should be expressly settled by this Court.

The majority of the Supreme Court of Illinois made no reference to petitioner's contention, undecided by the Appellate Court, that the amount of the jury verdict was

so excessive as to require a new trial or substantial remittitur. Since it is the invariable practice of the Illinois Supreme Court to remand for rulings on such undetermined questions (Illinois Law and Practice, Vol. 3, pp. 207-209, Appeal and Error §958), its decision of necessity includes a ruling that this further aspect of appellate jurisdiction is nullified by the FELA when the Appellate Court reviews cases brought under the Act.

This holding is directly contrary to decisions of numerous other State courts, many of which are cited at R. 61, Petition for Rehearing, pp. 12-13. This Court refused to review four of these cases, (*L. & N. R. Co.* v. *Grizzard*, 238 Ala. 49, cert. denied 308 U.S. 603; *Hallada* v. *G. N. Ry. Co.*, 245 Minn. 581, cert. denied 350 U.S. 874; *Miller* v. *Terminal R. Assn.*, 349 Mo. 944, cert. denied 317 U.S. 678; *Crowley* v. *E. J. & E. Ry. Co.*, 1 Ill. App. 2d 481, cert. denied 348 U.S. 927), and expressly sanctioned this exercise of local appellate authority in *Union Pacific R. Co.* v. *Hadley*, 246 U.S. 330, 334, and *St. L. I. M. & S. R. Co.* v. *Craft*, 237 U.S. 648, 661.

No court, to our knowledge, has ever held that a verdict in any amount, however excessive, is not reviewable. This Court in *Neese* v. *Southern Ry. Co.*, 350 U.S. 77, does not so hold. Whatever restrictions the Seventh Amendment or the Judiciary Act impose on Federal courts of review on issues of fact, these restrictions have no application to State courts. *M. & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211, 220.

Here again the Supreme Court of Illinois, by reading into the FELA what is not there, has surrendered a portion of the appellate power of Illinois courts which is of long standing and which is codified into Illinois statutory law. Ill. Stat. 1955, Ch. 110, §92(1)(c); App. 85A.

This Court should once and for all resolve these important and recurring problems of State court appellate jurisdiction in reviewing FELA cases. Until it does, confusion and conflicts will continue.

IV.

The interpretation placed upon the Federal Employers' Liability Act by the Illinois Supreme Court causes the Act to encroach upon the exclusive right of the State of Illinois, reserved by the Tenth Amendment, to prescribe and regulate the powers and jurisdiction of its courts. This new and undetermined question should be reviewed and settled by this Court.

Traditional partitioning of functions between our national and local governments precludes federal incursion by way of the Interstate Commerce Clause (United States Constitution, Art I, Sec. 8) into the matter of prescribing the jurisdiction and powers of State courts, which historically has been left exclusively to the sovereign States.

The Tenth Amendment to the Constitution of the United States, which provides

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

has been held to prevent any encroachment by the Federal Congress on the exclusive prerogative of the several States to fix and regulate the jurisdiction and powers of their own courts, and this without regard to the source of the rights in litigation.

In the early case of *Calder* v. *Bull*, 3 Dallas 386, Mr. Justice Chase wrote:

> "It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice within each state, according to its laws, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province and duty of the state legislatures: all the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the state governments are indefinite; except only in the constitution of Massachusetts."

In the later case of *Brown* v. *New Jersey*, 175 U.S. 172, this Court said (p. 175):

> "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *Ex parte Reggel*, 114 U.S. 642; *Iowa Central Railway* v. *Iowa*, 160 U.S. 389; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U.S. 226 . . ."

In the recent case of *Missouri* v. *Maufield*, 340 U.S. 1, the same general principle was applied (p. 4):

> ". . . if a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers' Liability Act. *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U.S. 377, 387. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here."

The dissenting judges in the Court below noted that the majority had placed an unconstitutional construction on the FELA, saying (R. 50; App. 34A-35A):

> "... It is neither the prerogative, nor the intent, of Congress to regulate the jurisdiction of State courts, nor to control and affect their modes of procedure. *Herb* v. *Pitcairn*, 324 U.S. 117, 120; *Brown* v. *Gerdes*, 321 U.S. 178, 189; *Missouri* v. *Lewis*, 101 U.S. 22, 30; *Second Employers' Liability Act Cases*, 223 U.S. 1, 56."

Other State and Federal courts have reached the same conclusion with respect to the effect of the Tenth Amendment. *Central of Georgia Ry. Co.* v. *Jones*, 152 Ga. 92, 108 S.E. 618, 620, cert. denied 260 U.S. 729; *Gibson* v. *B. & N. Ry. Co.*, 213 F. 488, 490; *Reisenhoff* v. *Colonial Nav. Co.*, 35 F. Supp. 577, 579.

If the Congress has legislated that in FELA cases state reviewing courts must abdicate all their powers save to determine whether the plaintiff established a *prima facie* case, as is held by the majority of the Court below, it has transcended its legislative powers. By ascribing this radically sweeping effect to the FELA, the Court below has brought the Act into irreconcilable conflict with the mandate of the Tenth Amendment that reserves to the respective States, *inter alia*, the exclusive right to control and regulate the powers and jurisdiction of their courts.

Just as Congress may not "force a duty" on State courts to accept FELA litigation, it may not force the States to alter the fundamental jurisdiction and powers of their courts in adjudicating FELA cases.

This Court held in *Ableman* v. *Booth*, 62 U.S. 506, that the Supremacy Clause (United States Constitution, Art. VI, par. 2) cannot supply the missing authority, saying (p. 519):

> "... The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not

authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. . . ."

The majority of the Illinois Supreme Court has placed an interpretation on the FELA which brings it into direct conflict with fundamental constitutional principles. Its decision should not be allowed to stand.

Conclusion.

The issue in this case as to the effect of the FELA upon State appellate practice is of great significance to the People of every State in the Union. As reflected in the opinions of the courts below, there is genuine uncertainty in this important area of the law. We believe the holding of the majority of the Supreme Court of Illinois mistakes the intent of Congress, and is at variance with basic principles announced by this Court and the decisions of other State reviewing courts which have considered the question. The construction placed on the FELA by the court below causes it to invade the powers of the States reserved by the Tenth Amendment to the Federal Constitution. The point at issue deserves the attention of this Court to do away with the confusion and conflict that has crept into this area of the law.

Respectfully submitted,

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